Remington Electric, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 110

Remington Electric, Inc. *and* Daniel Kees. Cases 18–CA–12953 and 18–CA–13060

July 21, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On April 13, 1995, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed an exception.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exception and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Remington Electric, Inc., Vadnais Heights, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraphs 2(a) and (b) and reletter the subsequent paragraphs.

''(a) Offer Peter Barrett immediate and full reinstatement to his former job or, if that longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

''(b) Remove from its files any reference to the unlawful layoff and notify Peter Barrett in writing that this has been done and that the layoff will not be used against him in any way.''

2. Substitute the attached notice for that of the administrative law judge.

[1] The exception was limited to the judge's finding that Peter Barrett was an employee and that his discharge violated Sec. 8(a)(1) and (3) of the Act.

[2] The Order is modified to include an 8(a)(1) violation found by the judge regarding recanting testimony that was included in his conclusions of law and remedy, but inadvertently left out of his recommended Order and notice. They have been changed accordingly.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT lay off and refuse to recall employees in order to discourage membership in International Brotherhood of Electrical Workers, Local Union No. 110 (Local 110) or any other labor organization, or because they file charges or give testimony under the Act.

WE WILL NOT coercively interrogate employees concerning their union activities and sympathies, or the union activities and sympathies of other employees, or their reasons for filing charges with the NLRB.

WE WILL NOT create the impression that employee union activities are under surveillance.

WE WILL NOT threaten our employees by telling them that all employees will be out of a job if they chose to contact a union representative, or by telling them that their job could be affected by filing charges or giving testimony to the NLRB.

WE WILL NOT tell employees to recant testimony they provided to the NLRB in the investigation of unfair labor practice charges.

WE WILL NOT threaten to physically harm employees, either literally or figuratively, in order to discourage participation in an NLRB investigation of unfair labor practice charges.

WE WILL NOT tell employees that we intend to make inaccurate entries in our records for the purpose of covering up the layoff of other employees for their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Peter Barrett immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

WE WILL make whole the estate of Daniel Kees for all losses incurred as a result of our discrimination against him together with interest as provided by law.

REMINGTON ELECTRIC, INC.

A. Marie Simpson, Esq., for the General Counsel.
Phyllis Karasov and *Noel Franklin, Esqs. (Moore, Costello & Hart)*, of Minneapolis, Minnesota, for the Respondent.
Jim Wagner, IBEW Local 110 Assistant Business Manager, for the Charging Party.

DECISION

STATEMENT OF THE CASE[1]

WILLIAM L. SCHMIDT, Administrative Law Judge. The issues here are whether Remington Electric, Inc. (Respondent or Remington) violated: (1) Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) by certain statements its supervisors and agents made to its employees during an organizing drive by the International Brotherhood of Electrical Workers, Local Union No. 110 (Union or Local 110); (2) Section 8(a)(1) and (3) by laying off Peter Barrett in December 1993; and (3) Section 8(a)(1), (3), and (4) by laying off Daniel Kees in March 1994.[2] In Barrett's case, an issue exists regarding whether he was an employee within the meaning of Section 2(3) while in Respondent's employ because of his compensation arrangement with Local 110 in consideration for engaging in organizing activities.

The Union filed 18–CA–12953 on December 20. The Regional Director for Region 18 of the National Labor Relations Board (NLRB or Board) issued a complaint in that case on February 28. Kees filed 18–CA–13060 on March 30. Thereafter, the Regional Director consolidated the two cases, and issued a consolidated and amended complaint (the General Counsel's operative pleading) on May 6. Respondent filed a timely answers denying the unfair labor practices alleged.

I heard this matter at Minneapolis, Minnesota, on July 27 and 28. After carefully considering the entire record, the demeanor of the witnesses, and the post-hearing briefs of the General Counsel and the Respondent, I find Respondent violated the Act substantially as alleged based on the following

FINDINGS OF FACT

I. OVERVIEW

Respondent, a Minnesota corporation with an office and place of business in Vadnais Heights, Minnesota, provides electrical contracting services for commercial, residential, and specialty projects. Respondent, in the course and conduct of its business, purchased and received at its construction projects within the State of Minnesota, goods valued in excess of $50,000 from other enterprises located within the State of Minnesota, each of which had received these goods directly from points outside the State of Minnesota. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The consolidated and amended complaint (complaint) alleged, Respondent admits, and I find that the Union is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

Before entering the electrical contracting business about 8 years ago, Tom Johnson, Respondent's owner and president, worked as a journeyman electrician and maintained membership in Local 110. Remington is, however, a nonunion operation.

In recent years, Respondent employed a core group of employees more or less on a regular basis. That core group included Foreman Terry Prince,[3] Master Electrician Robert Volk, and Kees, an apprentice electrician. Prince and Volk began working for Remington in late 1990 or early 1991; Kees started in August 1991. Other employees are hired from time to time as the workload dictates. Obviously, the workload arrived at a point requiring added personnel in late October and Respondent set about hiring more employees.

The first addition was Peter Barrett. He is a state certified journeyman electrician and a member of Local 110. Prior to his employment with Respondent, Barrett generally secured employment through the Local 110 hiring hall. In the fall of 1993, however, the referrals were scarce and Barrett was far down on the referral list after his layoff by a union contractor in October. Accordingly, Barrett arranged with Assistant Business Manager Jim Wagner to seek work at a nonunion shop. Under that arrangement, Wagner agreed that Local 110 would pay Barrett's fringe benefits and ''possibly'' any difference in wages if he engaged in organizing activities after obtaining nonunion employment.

In early November, Barrett completed a written employment application at Respondent's office that reflects prior work exclusively with area union contractors. By the time Johnson contacted Barrett a few days later, Barrett had obtained short-term employment through the hiring hall but agreed to notify Johnson when that job ended. On November 22, Barrett notified Respondent's office person of his availability.

Shortly thereafter that same day, Johnson called Barrett and asked him to report for work immediately at Respondent's Edina, Minnesota, post office project. Barrett arrived at the job within an hour and started to work. In addition to Prince, who was supervising the Edina project, Volk and Kees were working at that job when Barrett started.

Johnson said nothing to Barrett about his Local 110 affiliation throughout this preemployment period even though he, in all likelihood, knew that Barrett belonged to that Union. Any possible doubt ceased when Wagner wrote to Respondent on December 1, notifying Johnson that Barrett was engaged in organizing activities for Local 110. By this time, Barrett had begun speaking to the other electricians, including Prince, about the Union's benefits.

Respondent hired Dan Nerby and Tim Wiener for the Edina job around December 1. Weiner had about 2 years ex-

[1] Daniel Kees' name was added to the caption, a correction that reflects the General Counsel's hearing amendment.

[2] The relevant events occurred between November 1993 and April 1994. If not shown otherwise, further references to the months of November and December are in 1993; all other dates refer to 1994.

[3] Respondent admitted Prince is a 2(11) supervisor in answer to the complaint in Case 18–CA–12953 but denied that allegation in the amended consolidated complaint. The parties stipulated to Prince's supervisory status, however, at the hearing.

perience in the trade. Nerby's resume reflects about 10 to 12 years experience as an electrician. Nevertheless, Johnson characterized both as apprentices.

As the Edina project neared completion in mid-December, Barrett was laid off but Wiener and Nerby were assigned to other projects. The Union promptly filed the unfair labor practice charge in Case 18–CA–12953 claiming that Barrett was laid off because of his union organizing activities. During the investigation of that charge, Kees provided an affidavit to the NLRB investigator. The complaint that issued in that case on February 28 alleging that Barrett's layoff was unlawful also alleged several statements by Johnson and Prince, easily attributable to Kees, independently violated Section 8(a)(1).

Johnson laid Prince and Kees off on March 22 following attempts by Prince on the previous Friday to pressure Kees into recanting his NLRB statement in the Barrett case. Kees thereafter filed the unfair labor practice charge in Case l8–CA–13060 claiming that his layoff resulted from his testimony in Barrett's case and from his own union activities. The events relevant to the specific complaint allegations are detailed below.

Charging Party Kees is the foundation of the General Counsel's case. With the exception of complaint paragraph 5(b), discussed initially below, Kees' testimony is either the sole supporting evidence or the most critical evidence in support of the General Counsel's case. If you believe his testimony, the findings are clear. Respondent, obviously recognizing this fact, vigorously attacks his credibility.

As a witness, Kees impressed me as a youthful, self-assured, arrogant individual. Based on his deameanor alone, I have little difficulty believing some of the derelictions attributed to him by Respondent's witnesses, i.e., that he on occasion was late for work, that he abused the break periods and Respondent's telephone privileges, that he complained about assignments outside the Twin Cities, that he resisted leaving for these out-of-town assignments until the last minute and complained about not returning early enough, that he purchased personal tools on Respondent's account without the any prior authorization of the owner, and that he filed a claim for medical services without fully disclosing his assets. Respondent's witnesses painted a picture of Kees as a brash employee and Respondent argues that he has a dismal record for truth telling.

I find it impossible to rely on these subjective, demeanor based judgments, however, and conflicts over ancillary matters. Other more objective guideposts strongly favor Kees' credibility on the significant issues in this case. Thus, as will be detailed more specifically below, some of Respondent's witnesses actually corroborated all or significant portions of Kees' account about important issues. In other instances of substance, Respondent's witnesses failed to deny critical assertions made by Kees. And in at least one instance, Respondent called a witness who could have corroborated assertions made by its agent on a particular issue but failed to make any inquiry of that witness concerning the disputed matter. For these latter reasons, I have accorded Kees' testimony substantially more credence than I otherwise would.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The 8(a)(1) Violations*

Section 7 of the Act guarantees employees the right ''to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective-bargaining or other mutual aid and protection . . . .'' Section 8(a)(1) prohibits employer interference, restraint, or coercion of employees in the exercise of the Section 7 rights guaranteed under the Act. The specific activities called into play by the 8(a)(1) allegations in this case are: (1) creating an impression that employee union activities are under employer surveillance; (2) coercively interrogating employees about their protected activities; and (3) threatening employees for exercising Section 7 rights.

1. Complaint paragraph 5(b)

Complaint paragraph 5(b) alleges that Prince threatened an employee at the Edina job that joining the Union would put Respondent out of business. In support of this allegation, Barrett testified that he had approximately three conversations with Prince at the Edina job related to the Union's wages and benefits as a part of his efforts to interest employees in the Union. The first exchange occurred on December 2 or 3, during which Prince asked Barrett about the Union's medical benefits. After Barrett gave a brief summary from memory, Prince told Barrett that Johnson would never pay for a medical plan. About a week later, Barrett showed Prince a copy of the Union's current contractual wages and benefits. Prince told Barrett on this occasion that Johnson would never pay the wage rates indicated. Finally, on December 10, Barrett gave Prince copies of the union wage and benefit package and told Prince, ''You might want to give Jim Wagner a call.'' Barrett claims that Prince told him that calling the Union would put them all out of work.

Prince admits that Barrett spoke to him about union wages and benefits. He claims, however, that he told Barrett that Remington would probably lose one-third to one-half of its customers due to the pay hikes that would be required under the Union's area contract and that he did not believe Johnson ''would be able to remain in business because of it.'' Prince conceded that he probably also told Barrett that joining a union would ''probably put us all out of work.''

Respondent argues that Prince's statements are lawful predictions about the consequences of unionization. Employer predictions of adverse economic consequences from unionization made with supporting objective facts over which the employer has no control are lawful. *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1968); but see *Madison Industries,* 290 NLRB 1226, 1230 (employer's bare prediction that company would ''go broke'' if the union was not voted out held unlawful when employer failed to provide objective support for its prediction).

The General Counsel's brief contends that Prince's statements ''were emphatic and unequivocal, cause-effect: if employees exercise their statutory right to be represented by the Union, Respondent will cease operations and terminate their employment. As such, the General Counsel contends, Prince made no predictions, based on objective considerations, of

what might result from good-faith bargaining. Respondent, relying on Prince's account, claims that in its proper context Prince lawfully predicted that Remington would lose such a substantial portion of its customer base if it had to pay the union contract wages and benefits that it would be forced out of business.

Barrett and Prince have always agreed that Prince made the out-of-work remark. Prince admitted this on cross-examination in a prehearing statement provided to the General Counsel, however, he did not elaborate further. This admission leads me to believe that the critical loss of customers prediction that Prince related in his testimony at the hearing is a recent fabrication designed to mitigate Respondent's liability. Accordingly, I credit Barrett's version of the critical exchange and conclude that the admitted out-of-work remark in response to Barrett's invitation that Prince call Union Agent Wagner conveys the message that employees would be risking their employment prospects simply by exploring the subject of unionization. As such, it is unrelated to any lawful prediction under the Gissel test; instead, the out-of-work remark is an unlawful threat that violates Section 8(a)(1).[4]

2. Complaint paragraphs 5(a), (c), (d), and (e)

Complaint paragraphs 5(a), (c), (d), and (e) allege that Johnson unlawfully interrogated an employee and created the impression that employee union activities were under surveillance. In support of these allegations, Kees testified that, during the first week of December, Johnson asked him if Barrett had ever talked to him about anything. Kees, who assumed that Johnson was referring to union talk, answered, ''No, he hasn't.'' Johnson pressed the inquiry by asking if Kees was sure and Kees again denied that Barrett had spoken to him and asked Johnson about his curiosity. Johnson told Kees, ''Well, Pete's a Union plant.'' Kees asked Johnson how he knew this and Johnson answered, ''I have my ways of finding out.'' Johnson denied the ''have my ways'' remark but he recalled that Kees, ''asked me how I knew about Pete Barrett and I told him a friend of mine who is still an employee of Local 110 had called me up and mentioned it to me.''

On December 21, Kees stopped at Johnson's office. Kees testified that he asked Johnson about upcoming jobs and that that Johnson responded, ''Why, are you going to tell the Union?'' After Kees answered in the negative, Johnson then asked Kees if anyone from the Union had contacted him. Kees answered, ''no.'' Johnson then said, ''Are you sure nobody's contacted you recently?'' Kees again denied talking to anyone from the Union. Johnson then told Kees that he knew Kees hadn't talked to the Union for awhile. During the same conversation, Kees mentioned the fact that Barrett was ''no longer with us.'' Purportedly, Johnson responded, ''Yeah, I laid him off,'' and when Kees asked why, Johnson told him ''[b]ecause he was a union plant.'' Kees testified that Johnson then showed him the Union's letter about Barrett and that he read it.[5]

Johnson generally denied questioning any employees whether they were involved in union activities and he had no recollection of asking any employee about union contacts. Wiener, however, called as one of Respondent's own witnesses, testified that Johnson had also asked him whether the Union had contacted him.

The General Counsel alleges that Johnson unlawfully interrogated Kees and created the impression that employee union activities were under surveillance during the course of these two December conversations. Relying on its contention that Kees is not a credible witness in general as well as Johnson's specific denial of the ''I have my ways'' remark, Respondent argues that the offending exchange never occurred and ''is particularly unreasonable'' in light of the fact that the Union notified Johnson of Barrett's organizing intentions. Respondent contends, however, somewhat inconsistently that Kees' attempted to ''set Mr. Johnson up'' by pressing Johnson for the source of his information about Barrett. Respondent argues further that Johnson's December 21 remarks are insufficient to support the 8(a)(1) allegation even if Kees' testimony is true.

Employer interrogation of employees regarding union activities is unlawful if, on consideration of all of the circumstances, the conclusion is warranted that the questioning is coercive. *Garner Engineering*, 313 NLRB 755 (1994). Relevant factors considered in determining the coerciveness of employer interrogation include: (1) the background of the case; (2) the type of information sought; (3) the questioner's identity; and (4) the means and location of the interrogation. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985).

Employer actions or statements that would tend to create the impression that its employees' lawful union activities are under surveillance violate Section 8(a)(1). *Mississippi Transport v. NLRB*, 33 F.3d 972, 978 (8th Cir. 1994). An impression of surveillance is created when an employee can reasonably assume from the statement in question that their union activities were being observed and reported or noted. *Rood Industries*, 278 NLRB 160, 164 (1986). The standard is an objective one based on the perspective of a reasonable employee. See *Flexsteel Industries*, 311 NLRB 257 (1993). Evidence that management is, in fact, engaging in spying or surveillance is not required in order to show that an unlawful impression of surveillance has been created. Id.

For reasons already discussed, I am unwilling to discredit Kees testimony as Respondent would have me do. Instead, because of Johnson's lack of recollection concerning his inquiries of employees concerning their union contacts, Weiner's separate corroboration that Johnson made inquiries of this nature, and the time connection between Wagner's notice concerning Barrett and the first Johnson-Kees exchange, I credit Kees testimony concerning these two December conversations and find, in agreement with the General Counsel, that Johnson unlawfully interrogated Kees about employee Section 7 activities.

[4] Despite the variance between this finding and the original allegation, I am satisfied that the finding is warranted when, as here, the matter was fully litigated.

[5] No allegation was made that Respondent independently violated Sec. 8(a)(1) by Johnson's statement to Kees that Barrett had been laid off because he was a union plant.

Several factors support the conclusion that Johnson's early December inquiries were coercive. First, Johnson, as the president and owner, clearly had the authority to affect Kees' job. Second, Kees would likely perceive Johnson as having a direct interest in determining the extent and nature of any union organizing efforts. Third, the discussion took place only a few days after Johnson learned that Barrett was a union organizer, thus suggesting that Johnson's purpose was to learn the progress of any union organizing among Remington's employees and Kees' role in it, if any. And fourth, the interrogation was part and parcel of Johnson's ultimate message to Kees that he had the means of finding out about employee union activities.

For similar reasons, I conclude that Johnson's questioning of Kees on December 21 was also unlawful. The questioning took place within a week of Barrett's dismissal and in the course of the same conversation, Johnson told Kees that Barrett had been laid off because he was a union ''plant.''[6] Moreover, Johnson's pressing inquiry about Kees' contacts with the Union again served as a prelude for Johnson's message that Kees' contacts with the Union were being monitored. In view of these circumstances, I conclude that Johnson's questions were coercive.

I also conclude that Johnson's statements to Kees in early December about Barrett as a union ''plant'' would tend to create an impression of surveillance regardless of the account credited. Thus, by either witness' version, the message implicitly conveyed to Kees was that Johnson had secret sources providing him with information about employee organizing activities. Contrary to Respondent's contention, I do not find the allegation at all unreasonable because the Union had officially notified Respondent that Barrett would be engaged in organizing activities where, as here, Johnson failed to truthfully disclose that fact to Kees until their December 21 conversation. Having once implied to Kees that he had sources providing him with information about organizing activities, I find Johnson further statement to Kees on December 21 to the effect that Johnson knew Kees had not contacted the Union for awhile also tends to create an impression of surveillance as alleged.

3. Complaint paragraph 5(f)

Complaint paragraph 5(f) alleges that Johnson threatened an employee with physical harm if the employee participated in the investigation of the Barrett case. On January 10, Kees was present in Respondent's office while Johnson was on the phone. From the context of the conversation, Kees assumed that Johnson was talking to Prince about a visit from an agent from the National Labor Relations Board. While on the phone, Johnson looked toward Kees and said, ''Well, they probably have Dan on their side,'' and then stated, ''If he's involved in this investigation, I'm going to break his fucking legs.'' Kees asked him if he thought he could, to which Johnson replied, ''[Y]eah.''

Johnson recalled this particular incident but he denied saying that he was going to break Kees' legs or directing such a comment towards Kees. Instead, Johnson asserts that he was simply responding to an unnamed caller's question about whether Johnson was ''going to break a leg here?'' Both Kees and Johnson agree that Wiener was also present on this occasion but he was not asked to corroborate Johnson's account when called as Respondent's witness.

Although both Kees and Johnson agree that some such comment occurred, they disagree about the direction and purpose of the remark. As Weiner was not asked about the incident when called as Respondent's witness, I find it reasonable to infer that Wiener would not have supported Johnson's version if he had been asked.[7] Moreover, even though Johnson claimed to remember the incident, his account is otherwise vague and unsupported by any specific information. For these reasons, I credit Kees account of the conversation.

Employer threats directed at employees, including figurative threats of physical harm, which have a tendency to inhibit the free exercise of Section 7 rights violate Section 8(a)(1). *Cox Fire Protection*, 308 NLRB 793 (1992) (employer's figurative statement to an employee that he wanted to kick his ass because of the employee's union activity held unlawful.). The test for determining the unlawfulness of such threats, as well as other statements alleged as unlawful under Section 8(a)(1), turns on whether the employer's statement ''has the tendency to interfere with, restrain, or coerce the employees in the exercise of their Section 7 rights'' rather than the employer's actual intent. Id.

I find, in agreement with the General Counsel's contention, that Johnson's remark in the presence of Kees and Wiener violated Section 8(a)(1). Although no basis exists to conclude that Johnson was speaking other than metaphorically, the context described by Kees warrants the conclusion that Johnson was threatening retaliation against Kees if he cooperated with the investigation of Barrett's charge. As such, the remark is comparable in nature and circumstance to the remark found unlawful in the Cox case. By intimidating Kees with respect to the his cooperation in the Barrett investigation, Johnson necessarily infringed on the Section 7 rights of not only Kees and Wiener who overheard the remark but also Barrett who was not present.

4. Complaint paragraph 5(g)

Complaint paragraph 5(g) alleges that Johnson ''threatened'' to alter an employee's attendance record to aid its defense of the Union's charge. In support of this allegation, Kees testified that he went to Johnson's office for his paycheck on February 11, just prior to leaving on his vacation. At that time, Johnson purportedly told Kees that his vacation time would be recorded as a temporary layoff in order to improve Respondent's defense in Barrett's case. Johnson denied this assertion by Kees and correctly pointed out that Kees' record was not, in fact, altered. The payroll records in evidence do not reflect any reason for Kees' subsequent absence. For that matter, Respondent's records do not reflect that either Barrett or Kees' were laid off as discussed below

[6] Kees testified that Prince also told him that Barrett had been let go because of that Union ''bullshit'' but the record does not indicate when Prince made this remark. The complaint contains no independent 8(a)(1) allegation concerning this remark by Prince.

[7] I make this inference not merely because Respondent called Wiener as its witness but also because Wiener, in the course of his testimony, made it clear that he was favorably disposed toward Respondent and opposed to the Union. See *International Automated Machines*, 285 NLRB 1122 (1987).

but they do indicate that a break in Prince's pay in March and April was due to a layoff.

In view of the conclusion I reached with respect to complaint paragraph 5(f), above, and complaint paragraphs 5(i) through (n), below, I credit Kees' account of this exchange. In reaching this conclusion, I have also considered Johnson's inconsistent statements about the exchanges leading up to Kees' vacation as well as the fact that Respondent did not always make any record entry in its payroll records concerning the purpose for an absence. Although the record demonstrates Respondent's awareness of Kees' prounion sentiments and cooperation in the investigation of Barrett's layoff, the plethora of evidence reflecting attempts by Respondent's agents to interfere with that investigation does not render this Kees' testimony on this allegation implausible. As Kees' account reflects that Johnson disclosed to Kees that he was considering using Kees' absence for misleading purposes in the pending Barrett case, I find the remark violates Section 8(a)(1) as alleged.

5. Complaint paragraph 5(h)

Complaint paragraph 5(h) alleges that Prince interrogated an employee on or about March 14 about whether the employee had given a statement to the Board. The only evidence remotely related to this allegation is Kees' testimony that he told Prince in the course of a discussion around March 12 that he had given a statement to the Board. I agree with Respondent's contention that Kees volunteered this statement without any prompting on Prince's part. Accordingly, I will recommend dismissal of this allegation.

6. Complaint paragraphs 5(i) through (l)

Complaint paragraphs 5(i) through (l) allege that Prince unlawfully interrogated and threatened Kees, and told him to recant his Board testimony. Prince and Kees had two relevant conversations on March 18. The first occurred immediately after Prince arrived at the jobsite in the morning and the second occurred at lunchtime. By Kees' account, Prince said to Kees during the first conversation: ''Do you have something with the Union? If you do, you can tell me. I won't tell Tom.'' Kees denied that he did but he again mentioned that he had given a statement to the Board. Kees went on to say, ''I talked to them [the Board] about the threat he [meaning Johnson] made to me, I could've told him a lot more.'' Prince shook his head and stated, ''Well, you should call the NLRB up and take back everything you said. Tell them you were just pissed at Tom at the time and try to call Tom and try to work things out with him.'' Prince then told Kees his statement to the Board may have cost him his job. Purportedly, Prince also asked if Kees had told the Board agent that Prince had lied when he gave his statement, and told Kees that he would be very angry if Kees had revealed his dishonesty.[8]

According to Kees, Prince urged him again at lunch to call the NLRB and recant his statement. Prince then related to Kees that Johnson ''wasn't real happy with [Prince] for what he said to the NLRB.'' Prince told Kees that Johnson had said that Prince's statement ''didn't hurt him'' but that it ''didn't help him either.''

Prince admitted that he asked Kees to change the statement he had given to the NLRB but did not otherwise address the March 18 conversations recounted by Kees

Employer attempts to influence an employee's testimony before the Board or discourage an employee from pursuing an unfair labor practice charge are unlawful. *Aero Metal Forms*, 310 NLRB 397, 398 (1993) (discharging an employee for refusing to fabricate Board testimony held unlawful); *Weinreb Management*, 292 NLRB 428, 432 (1989) (pressuring an employee to abandon a grievance held unlawful); *Independent Stave Co.*, 278 NLRB 593, 598 (1986) (telling an employee that he would ''get his ass in trouble'' for filing unfair labor practice charges held unlawful).

In view of Prince's admission and Kees uncontradicted testimony concerning the other matters of substance during the two March 18 conversations, I find that General Counsel has proven the allegations in complaint paragraph 5(i) concern interrogation about ''involvement with the Union,'' paragraph 5(j) concerning the Prince's direction to Kees about recanting testimony provided to the Board, and paragraph 5(k) concerning the potential impact Kees' Board statement might have on his job.

I recommend dismissal of complaint paragraph 5(l). It asserts that Prince threatened Kees about by telling him that Johnson was ''angry about statements made to the Board.'' In her brief, counsel for the General Counsel argues that Prince's remark in the second March 18 exchange that Johnson ''wasn't real happy'' with Prince over Prince's statements to the Board, would tend to exert a coercive influence on Kees to avoid actions that might endanger his continued employment.

At best, I find that the remark is a very oblique reinforcement of the direct threat Prince made early that morning that Kees could lose his job because of the statement he had provided the Board agent. As such, the allegation adds nothing to the remedial Order below. Moreover, because Prince is a supervisor, I am not satisfied that this remark, standing alone, would be sufficient to violate the Act. Although the Board adheres to the theory that the Act protects statutorily excluded individuals from discrimination designed to discourage their participation in the Board's processes, I do not read that protection—articulated in *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), *Oakes Machine Corp.*, 288 NLRB 456 (1988), and similar cases—as being so broad that employer criticism of supervisors about the content of their statements to the Board is precluded. That seems especially true when, as here, Johnson was present and overheard both the tone and substance of Prince's statements to the Board agent.

7. Complaint paragraphs 5(m) and (n)

Complaint paragraphs 5(m) and (n) allege that Prince interrogated an employee about his reasons for filing a Board charge and threatened the employee that his job had been jeopardized because of the employee's involvement with the Board. As noted above, Kees filed a charge with the NLRB on March 30 concerning his layoff about a week earlier. In early April 1994, Prince telephoned Kees to ask why he had filed the charge. Prince then tried to convince Kees that Johnson did not lay Kees off due to his union activity or his

[8] Kees claimed that in an earlier conversation around March 1, Prince had stated that he did not like ''lying for Tom'' when he gave his NLRB affidavit.

statement to the Board. Prince told Kees, however, that he had ruined his chances of being called back by filing the charge.

On this latter point, Prince testified that he told Kees that he ''may have jeopardized'' his chances of being called back by filing the charge. Prince also testified that he informed Johnson of this call a couple of days later. There is no evidence that Johnson reacted to this information by taking action of any kind to diminish its import.

I find Prince's inquiry concerning the reasons Kees filed a charge is unlawful, coercive interrogation especially when Prince also unlawfully threatened in the same phone call that Kees might not be recalled from layoff because he filed a charge. Although Prince was also laid off at that time, his uncontradicted testimony that he informed Johnson of the call a short while later coupled with Johnson's inaction on learning of that news leads me to conclude that Johnson effectively adopted Prince's conduct. Accordingly, I find Respondent violated Section 8(a)(1) as alleged in complaint paragraphs 5(m) and (n).

B. *The 8(a)(3) and (4) violations*

Section 8(a)(3) prohibits employers from discriminating in regard to an employee's ''tenure of employment . . . to encourage or discourage membership in any labor organization.'' Section 8(a)(4) prohibits employers from ''discharg[ing] or otherwise discriminat[ing] against an employee because he has filed charges or given testimony under [the] Act.''

An employer violates Section 8(a)(3) by laying off employees because of their union activities. *Equitable Resources*, 307 NLRB 730, 731 (1992). An employer violates Section 8(a)(4) by laying off an employee suspected of furnishing information supporting unfair labor practice charges in another case. *Operating Engineers Local 302*, 299 NLRB 245 (1990).

As 8(a)(3) and (4) cases generally turn on the question of employer motivation, the Board and the courts employ a causation test to analyze the merits of such allegations. *Wright Line*, 251 NLRB 1083 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See also *NLRB v. Sea-Land Service*, 837 F.2d 1387 (5th Cir. 1988). The *Wright Line* test requires the General Counsel to make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated the employer's adverse action. Typically, the General Counsel meets this burden by presenting credible evidence showing a reasonable proximity in time between the adverse action in question and the employer's knowledge of, and hostility toward, the employee's protected activity. *Best Plumbing Supply*, 310 NLRB 143 (1993). Although not conclusive, timing is usually a significant element in finding a prima facie case of illegal layoff. *Equitable Resources*, supra.

If the General Counsel establishes a prima facie case, the employer must then shoulder the burden of persuading the trier of fact by a preponderance of the evidence that the same adverse action would have been taken even in the absence of the employee's protected activity. *Best Plumbing Supply*, supra. To meet this burden ''an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.'' *Roure Bertrand Dupont*, 271 NLRB 443 (1984).

1. Barrett's layoff

As noted above, Barrett began working for Respondent on November 22, and was laid off on December 14, ostensibly for lack of work. Of the three employees hired in late 1993, only Barrett was a licensed electrician. As such, Barrett could legally work by himself on a project in Minnesota.

I am satisfied the General Counsel established a prima facie case that Barrett was selected for layoff because of his union activities during his short tenure with Respondent. This conclusion is based on the evidence detailed previously that establishes that Barrett, in accord with the prior arrangement made with Union Agent Wagner, talked to other employees about the benefits of unionization, and that Johnson knew of both Barrett's arrangement with the Union and his specific activities on the Union's behalf at the Edina job. Soon after learning of Barrett's activities, Johnson set about interfering with that activity by unlawfully interrogating Kees, known to be a likely supporter of unionization, and by attempting to create the impression of surveillance. Prince reinforced Respondent's hostility toward unionization by telling Barrett that contacting the Union's agent would ''probably put us all out of work.'' Finally, Kees claims that both Johnson and Prince admitted to him, following Barrett's layoff, that Barrett had been let go because of his union organizing activities.[9]

According to Johnson, Barrett's layoff coincided with the normal winter slowdown. Although some work remained and additional work was in the bidding stage, Johnson asserts that he concluded there was not enough work to keep everyone busy and that he selected Barrett for layoff essentially because his pay rate was higher than either Weiner or Nerby, the other newly hired employees, and because Barrett's lethargic work manner required constant supervision.

There is mixed evidence about the winter slowdown. Some evidence indicates that Respondent's overall claim of a work slowdown is questionable. Both Barrett and Kees claim that numerous job orders were posted on the board behind Johnson's desk during the week prior to Barrett's layoff. In fact, Barrett testified that Johnson advised him on December 12 that he would be assigned to a job in southern Minnesota if it appeared following Johnson's personal inspection the following day that the necessary trenching through the frost-laden ground could be performed with the Remington's equipment. Johnson then telephoned Barrett on December 14 to advise that he was being laid off because the Respondent was going to a ''skeleton crew'' for the winter and apparently never mentioned the southern Minnesota job further. Furthermore, when Kees made requests in late December and in January for vacation time in February, Johnson refused to accede to the request on the ground that Respondent was too busy.

On the other hand, Johnson asserts that the postings on job board are not a reliable measure of the amount of work

[9] As previously mentioned, Kees testified that Johnson told him on December 21 that Barrett had been laid off because he was a union plant. Kees testified that Prince told him Barrett had been laid off because of the ''Union bull-shit.'' Johnson denied the statement attributed to him by Kees; Prince did not.

available to Remington employees at any given time. Although Johnson made no attempt to explain the situation with the particular job identified as Barrett's next potential assignment in the December 12 telephone call, it is possible to infer that job was either given to another contractor or deferred to the following spring. Johnson also explained that he refused to make an early commitment concerning Kees' vacation request because he anticipated a project on which Kees would be required but that it did not materialize. But most importantly, no new employees were hired after Barrett's layoff and Respondent's individual earnings records do not show an unusual amount of overtime was worked following Barrett's layoff. This more objective evidence indicates that a business justification existed for a layoff so the question then becomes why Barrett was selected.

Regarding the wage differential, Johnson initially testified that Barrett's hourly pay was $30 compared to Nerby's $15 hourly rate and Weiner's $7 or $8 hourly rate. On cross-examination, however, Johnson admitted that Barrett's normal wage rate was $17 per hour and that Barrett was only paid the $30 rate on the Edina post office job pursuant to a prevailing wage regulation. Hence, this initial attempt to magnify Barrett's wage differential detracts from the convincing character of Respondent's case on this point.

At the hearing, both Prince and Weiner supported Johnson's claim that Barrett was a slow or lethargic worker. Kees, Prince, and Weiner all testified, however, that they never heard Johnson criticize Barrett's work habits before his layoff and neither Kees nor Weiner ever overheard Prince comment negatively about Barrett's work. By contrast, Kees and Weiner both heard Johnson complain about Nerby's slowness prior to Barrett's layoff, and Prince agreed that Nerby was not a fast worker. In an apparent effort to explain this inconsistent prior assessment, Johnson admitted, in effect, that he initially had made a mistaken assessment of Nerby's work. Because of this inconsistent assessment, Respondent's evidence about Barrett's work appears tailored to justify Barrett's layoff for purposes of this case.

Finally, Respondent's contention that it had hired other employees in the past who have had an affiliation with the Union or its sister locals, while obviously relevant especially to the question of hostility, does not conclusively demonstrate the lack of an unlawful motive in Barrett's case because there is no evidence that these other employees ever actively engaged in organizing efforts.

Based on the foregoing discussion, I find Respondent has failed to meet its burden of persuasion. Even assuming that Respondent needed to layoff one employee at the time Barrett was let go, Respondent's explanation for selecting Barrett is not convincing especially in view of Johnson's stated assessment of Nerby as a slow worker contemporaneous with his selection of Barrett as the employee to let go. When coupled with Johnson's initial attempt to paint a misleading picture concerning Barrett's regular pay rate, Respondent's explanation for targeting Barrett acquires an entirely unconvincing quality. I conclude, therefore, that the explanation offered concerning Barrett's selection for layoff is pretextual and designed to mask its unlawful motive.

Despite its motive, Respondent claims that, as a paid union organizer, Barrett was not an employee within the meaning of Section 2(3) of the Act while in its employ and, hence, he is not entitled to the Act's protection. In support, Respondent cites *Town & Country Electric v. NLRB*, 34 F.3d 625, 628 (8th Cir. 1994), cert. granted 115 S.Ct. 933 (1995). In that case, the Eighth Circuit held, contrary to the Board, that part-time paid union organizers who apply for jobs for the purpose of organizing workers are not employees within the meaning of the Act. Id. at 629.

Despite the fact that Barrett ultimately received no reimbursement from the Union because almost all of his employment with Respondent was on a job governed by prevailing wage regulations, his admitted arrangement with Wagner appears to bring this case squarely under the *Town & Country* holding by the Eighth Circuit in which this case arises. Established Board precedent provides, however, that the term ''employee'' should be construed broadly to include even paid, full-time union organizers. *Sunland Construction Co.*, 309 NLRB 1224 (1992).[10] As an administrative law judge I am compelled to apply Board precedent until it is reversed by either the Board or the Supreme Court. *Iowa Beef Packers*, 144 NLRB 615, 616 (1963). Accordingly, with all due deference to the Eighth Circuit's holding in the *Town and Country* case, I find that Barrett is an employee within the meaning of Section 2(3) of the Act and that Respondent violated Section 8(a)(1) and (3), as alleged, by discriminatorily laying off Barrett for his union activities.

2. Daniel Kees' layoff

Daniel Kees began working for Respondent as an electrician apprentice in August 1991. In 1992, Kees was laid off twice in by the Respondent and subsequently rehired. Kees' tenure with Respondent continued until late March 1994 when he, too, was laid off.

According to Johnson, Kees and Prince were laid off on March 22 because of a further slow down in work. Immediately prior to their layoff, Kees and Prince had been working at a Wabasha Street location in St. Paul, Minnesota. When they completed their work on that project at about noon on March 22, Prince telephoned Johnson for instructions. Johnson asked that they wait at the jobsite until he arrived. After arriving a short while later, Johnson informed Kees and Prince that he had no further work for them and would have to lay them off.

Johnson testified that he anticipated the layoff and had decided on the previous day on the selection process he would use. As Johnson explained it, he had to keep Volk, Remington's master electrician, and he decided to keep Weiner, the least experienced and one of the most junior employees, ''because he was really doing quite well for the company.'' In contrast, Johnson claimed that Kees' dependability was ''greatly deteriorating'' toward the end of his employment. Nerby was laid off about a week after Kees and

[10] Likewise, no other circuit has gone so far as to hold that part-time union organizers are lack employee status under Sec. 2(3) of the Act. See *Ultrasystems Western Contractors v. NLRB*, 18 F.3d 251, 255 (4th Cir. 1994); *NLRB v. Elias Brothers Big Boy*, 327 F.2d 421, 427 (6th Cir. 1964); *Wilmar Electric Service v. NLRB*, 968 F.2d 1327, 1329–1331 (D.C. Cir. 1992), cert. denied 113 S.Ct. 1252 (1993); *NLRB v. Henlopen Mfg. Co.*, 599 F.2d 26, 30 (2d Cir. 1979). Presumably, this conflict between the Eighth Circuit and the other courts of appeals that have considered this issue will now be resolved by the Supreme Court in the *Town & Country* case pending before it.

Prince.[11] There is no evidence that replacements were hired for the three laid off employees but Nerby and Prince returned to work more or less full time about 6 or 7 weeks later.[12] Kees was never recalled.

The General Counsel established a prime facie case that Kees' layoff and Respondent's subsequent failure to recall Kees were both motivated for reasons prohibited by Section 8(a)(4). The clear essence of the Prince-Kees exchanges on March 18 was as follows: (1) Johnson and Prince had discussed the investigation that led to the complaint issued against Respondent about 3 weeks earlier; (2) Johnson was not pleased with even with Prince's testimony in the investigation; and (3) Kees should recant his statement to the General Counsel and make peace with Johnson or his job was in jeopardy. The timing between Prince's advice and Kees layoff strongly supports an inference that Kees was targeted for layoff because he failed to heed Prince's March 18 advice. Moreover, Prince's April telephone call to Kees about his own charge and advising that he had harmed his chances for recall also permits an inference that his subsequent failure to be recalled was unlawfully motivated.

Respondent's brief argues in pertinent part that ''[Respondent] simply did not have enough cash flow and could not afford payroll: Despite Mr. Kees' performance problems, Mr. Johnson kept him until Remington could no longer afford to retain all of its employees.'' Although the reasons asserted by Respondent may, if true, provide Respondent with several legitimate reasons for deciding to lay Kees off, I am not persuaded that they are the true motivating factors.

Respondent attempted to justify Kees' layoff selection through proof that Kees was indolent, unreliable, and dishonest. To support its claim, Respondent submitted evidence of conflicts between Kees and Master Electrician Volk. Volk complained that Kees made too many personal calls during worktime, took excessive breaks, resisted his instructions, and frequently wanted to return from out-of-town projects early on Fridays. Eventually, Volk advised Johnson that he would not work with Kees again. Nevertheless, most of Volk's complaints concerned their work on projects at least a year prior to Kees' final layoff and Johnson, for all intents and purposes, ignored Volk's request concerning Kees assignments albeit Johnson informed Kees of Volk's ultimatum.[13] Likewise, Respondent's assertions that Kees complained about, or resisted, working on projects away from the Twin Cities is weakened by evidence showing that Kees, in fact, worked out of town numerous times and Johnson's admission that Kees would go to the jobs as assigned.

Respondent also raised the accusation that Kees had stolen equipment and materials from Remington. This claim also had a stale quality to it. In 1992, Kees was laid off from mid-June until November following a report to Johnson by Kees' exgirlfriend, the former office secretary at Remington, that Kees had stolen company tools and materials and had invited union agents to photograph him working alone on projects to support complaints against the Remington. Kees flatly denied the accusation about stealing from Remington and asserted that he did not learn of the reason for the long layoff until shortly before he returned to work. By Kees' uncontradicted account, Prince and Volk aided in his return to work for Respondent. Neither Prince nor Volk knew of Kees misappropriating Respondent's property.

Johnson also alleged that Kees would sometimes report to work late—that there were even instances where he called Kees as late as 9 a.m. to wake him for work. Prince likewise testified that Kees would sometimes report to work 5 to 10 minutes late. Yet, these assertions are inconsistent with Johnson's statement that Kees and Prince routinely arrived at projects between 7 and 7:30 a.m. even though the required reporting time was 8 a.m. In addition, Johnson failed to provide any timeframe concerning the alleged wake up calls and Prince admitted that he usually did not tell Johnson about Kees' tardiness.

Johnson asserted other miscellaneous allegations that Kees purchased personal tools on Respondent's account without Johnson's required prior approval, entered Johnson's office in February 1994 without authorization, and used company tools for personal projects without authorization. No specific evidence was adduced concerning the latter allegation. Kees admitted entering Respondent's locked office in February while both Johnson and the office secretary were absent but asserts, without contradiction, that Johnson learned of this incident when Kees answered Johnson's phone call to the office. The unauthorized tool purchases purported occurred in December, February, and March but there is no evidence that Kees was ever reprimanded for these purchases or that Kees intended to avoid reimbursing Respondent for these minor purchases.

Against the strength of the General Counsel's case, I find Respondent's explanation for targeting Kees for layoff in March an unpersuasive laundry list of derelictions, most long tolerated by Johnson, now seized on to justify laying off Kees. Indeed, Johnson admitted that when interviewed by a Board agent regarding the reasons for Kees' layoff, he neglected to raise most of the reasons cited at the hearing. This admission reinforces my belief that the explanations propounded by Respondent represent a groping effort to justify getting rid of Kees for unlawful reasons.

In sum, I conclude that Respondent has failed to meet its *Wright Line* burden with regard to Kees' layoff. I find, therefore, that Respondent violated Section 8(a)(1) and (4) of the Act by laying Kees off on March 22 and failing thereafter to recall him for work. In view of this conclusion, I find it unnecessary to consider General Counsel's further claim that Respondent also violated Section 8(a)(3) by Kees' layoff.

[11] The payroll records depict a confusing picture that was never adequately explained but no argument is fashioned around the records. Thus, the records show that Kees received two checks on March 22, apparently because he requested to be paid immediately. Both Nerby and Prince received paychecks for the week ending March 25 and paychecks for less than 15 hours work for the week ending April 1. Nerby received checks for a small number of hours each week for the other April pay periods with the exception of the week ending April 22.

[12] Prince asserted that he had been laid off for comparable periods during the same months in 1992 and 1993. The payroll records seemingly show otherwise but this may be due to Respondent's prior practice of allowing employees to bank overtime throughout the year for use when they were laid off or otherwise chose not to work.

[13] At the hearing, Volk and Kees impressed me as having a massive generational, temperamental, and personality gap.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7).

2. The Union is a labor organization within the meaning of Section 2(5).

3. Peter Barrett is an employee within the meaning of Section 2(3).

4. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) by (a) coercively interrogating an employee about his union activities, the activities of other employees, and his reason for filing an NLRB unfair labor practice charge; (b) creating the impression that employee union activities were under surveillance; (c) telling an employee that all employees could be put out of work by contacting a union agent; (d) telling an employee that his legs would be broken if he cooperated in an NLRB investigation; (e) telling an employee that it might alter its records to show vacation time as layoff time in order to strengthen its defense against an NLRB unfair labor practice charge; (f) requesting that an employee recant testimony given to the NLRB; and (g) telling an employee that he had harmed his chance of recall from layoff because he filed an NLRB unfair labor practice charge.

5. Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) by laying off Peter Barrett on December 14, 1993.

6. Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (4) by laying off Daniel Kees on March 22, 1994, and thereafter failing to recall him.

7. The unfair labor practices of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, the recommended Order requires Respondent to cease and desist therefrom and to take the following affirmative action designed to effectuate the policies of the Act.

Respondent must immediately offer in writing to reinstate Peter Barrett to his former position or, if that position no longer exists, to a substantially equivalent position. No reinstatement order will be entered for Daniel Kees in light of counsel for the General Counsel's representation in her brief that Kees was killed in an accident in September 1994. Respondent must also make Peter Barrett and the estate of Daniel Kees whole for the loss of earnings and other benefits suffered by reason of Respondent's discrimination against them. Backpay will be computed on a calendar quarterly basis as provided in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Remington Electric, Inc., Vadnais Heights, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off and failing to recall employees in order to discourage membership in a labor organization, or because they file charges or give testimony under the Act.

(b) Coercively interrogating employees concerning their union activities and sympathies, the union activities and sympathies of other employees, or their reasons for filing an NLRB charge.

(c) Creating the impression that employee union activities are under surveillance.

(d) Threatening employees that they would all be out of work if they chose to contact a union representative.

(e) Threatening to physically harm employees, either literally or figuratively, in order to discourage participation in an NLRB investigation of unfair labor practice charges.

(f) Telling employees that it intends to make inaccurate entries in its records for the purpose of covering up the layoff of other employees for their union activities.

(g) Telling employees that their job tenure or recall chances could be affected by filing charges or giving testimony under the Act.

(h) Telling employees to recant testimony they provided to the NLRB in the investigation of unfair labor practice charges.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately offer in writing to reinstate Peter Barrett to his former position and make Barrett whole for all losses resulting from his December 14, 1993 layoff as specified in the remedy section of the administrative law judge's decision.

(b) Make the estate of Daniel Kees whole for all losses resulting from his March 22, 1994 layoff as specified in the remedy section of the administrative law judge's decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Vadnais Heights, Minnesota office and at its current jobsites copies of the attached notice marked ''Appendix.''[15] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that all complaint allegations not sustained in the administrative law judge's decision in this case be, and the same hereby are, dismissed.